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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

WALTER A. LAVENDER, Administrator de bonis non of the Estate of L. E. Haney, Deceased,
Petitioner,

vs.

J. M. KURN et al., Trustees of ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Debtor, and ILLINOIS CENTRAL RAILROAD COMPANY,
Respondents.

No. 550.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

BRIEF OF PETITIONER.

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BRIEF OF PETITIONER.

This case is here pending upon writ of certiorari awarded by this court on the third day of December, 1945, to review a final judgment and opinion of Division No. 1 of the Supreme Court of Missouri, entered on June 4, 1945 (R. 320), reversing a $30,000 judgment in favor of petitioner and against respondents, and in which case a motion for a rehearing and to transfer the cause to the Supreme Court of Missouri in banc was filed and entertained and denied on July 2, 1945 (R. 368), at which

time said judgment became final. Upon application of your petitioner this Honorable Court on September 24, 1945, entered its order that the time for filing a petition for a writ of certiorari in this cause be and the same was ordered extended to and including November 2, 1945. The petition for a writ of certiorari was filed in this Court on October 26, 1945.

OPINION OF THE COURT BELOW.

The opinion of Division No. 1 of the Supreme Court of Missouri in said cause of Walter A. Lavender, Administrator de bonis non of the Estate of L. E. Haney, Deceased (Plaintiff), Respondent, v. J. M. Kurn et al., Trustees of the St. Louis-San Francisco Railway Company, Debtor, and Illinois Central Railroad Company (Defendants), Appellants, which petitioner here seeks to have reviewed, is reported in 189 S. W. 2nd, at page 253, and appears on pages 320 to 331 of the transcript of the printed record filed herein.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based upon Section 237 of the Judicial Code as amended and reformulated by the Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 937, Title 28, U. S. C. A., sec. 344, providing that it shall be competent for this Court, by certiorari, to require that there be certified to it for review and determination any cause wherein a final judgment or decree has been rendered by the highest court of a state in which a decision could be had where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute, of, or commission held or authority exercised under, the United States.

The judgment of the Supreme Court of Missouri, Divi-

sion No. 1, sought to be reviewed was originally entered on June 4, 1945 (R. 320). A motion for a rehearing and to transfer said cause from Division No. 1 to the Missouri Supreme Court in banc was filed on June 18, 1945, within the time provided by the rules of the Supreme Court of Missouri (R. 332), and said motion of petitioner for a rehearing and to transfer said cause to the Missouri Supreme Court in banc was denied by said Division No. 1 of the Supreme Court of Missouri on July 2, 1945, which is the date on which the judgment of said Division No. 1 of the Supreme Court of Missouri in said cause became final. Division No. 1 of the Supreme Court of Missouri, upon its refusal to grant a rehearing and to transfer the cause to the Court in banc, was the highest Court of the State in which a decision could be had in said cause; and in said cause, petitioner specially set up and claimed a right under a statute of the United States, namely, the Employers' Liability Act, 45 U. S. C. A., sec. 51, Act of April 22, 1908, c. 149, sec. 8, 35 Stat. 65 (R. 2-6). Which right was denied petitioner by said Supreme Court of Missouri, Division No. 1.

Cases which sustain the jurisdiction of this Court are:

Seago v. New York Central R. Co., 315 U. S. 781, 62 Sup. Ct. Rep. 806;
Jenkins v. Kurn, 313 U. S. 256, 61 Sup. Ct. Rep. 934;
New York Central R. Co. v. Marcone, 281 U. S. 345;
Puget Sound Power & Light Co. v. County of King, 264 U. S. 22.

STATEMENT OF THE CASE.

Pleadings in the State Court.

Petitioner in the State court charged that L. E. Haney, the deceased, and the respondent Railroads were all engaged in interstate commerce between the State of Alabama and the State of Tennessee at the time the decedent was injured and killed.

Petitioner's third amended petition and complaint, upon which this cause was tried in the state court, charged that L. E. Haney was employed by the defendants as a switch-tender in throwing, setting and regulating switches for railroad cars and trains in the switchyard of the Grand Central Station at Memphis, Tennessee, on and before December 21, 1939; that he was ordered, directed and required by the defendants to throw or open a switch so that defendant trustees could back an interstate Frisco passenger train from Birmingham, Alabama, into the Grand Central Station at Memphis, Tennessee; that the said L. E. Haney did in performance of his duty and as a servant of defendants on said last mentioned date, open a switch and that defendants' trustees did back a long interstate Frisco passenger train over the track and switch which said Haney had opened past the place where Haney was standing near said switch, and that as said interstate passenger train backed past Haney, defendant trustees negligently caused, suffered and permitted a rod, stick or other object to project out or swing out from the side of the said Frisco passenger train and to strike said Haney, knocking him to the ground and injuring him so severely that he died as a direct result of said injuries on the 21st day of December, 1939.

Petitioner's complaint against defendant Illinois Central Railroad Company charged that said Railroad Company is the employer of L. E. Haney, the deceased, and

gently failed to furnish Haney with a reasonably safe place to work, in that the ground where he was required to work was high and uneven and the light insufficient and inadequate and that the backing train had an object or rod sticking or swinging out to the side as it passed Haney, and that said place was unsafe and dangerous. Respondent railroads in the State Court filed separate answers to petitioner's third amended petition, which were general denials (R. 8).

The Evidence.

The evidence shows that L. E. Haney died on December 21, 1939, at Memphis, Tennessee, as a result of injuries suffered on that date in the Railroad yards of the Grand Central Station at Memphis, Tennessee, and upon his death left surviving him his widow, Mrs. Julia Haney, and two children, a son and a daughter; that your petitioner was thereafter appointed administrator de bonis non of the Estate of said L. E. Haney, deceased, and was thereafter named as plaintiff in the State Court.

The undisputed evidence in the record is that L. E. Haney was a switch tender working at the duties assigned to him at the time he was injured and killed on December 21, 1939, in the railroad yards near the Grand Central Station at Memphis, Tennessee. The evidence further shows it was Haney's duty to open the switch for the respondent Trustee's interstate passenger train on its regular run from Birmingham, Alabama, to the Grand Central Station at Memphis, Tennessee.

The evidence shows that Haney opened the switch and the interstate passenger Frisco train backed over said switch into Grand Central Station; that Haney's duty after opening the switch was to remain at the switch and close it when the passenger train had passed over (R. 219, 295). Haney opened the switch, but was killed before he closed it. Respondent, Illinois Central Railroad Company

was in possession of and owned Grand Central Station (R. 190), and had a contract with Respondent, J. M. Kurn et al., Trustees of the St. Louis-San Francisco Railway Company for the joint use of Grand Central Station by the Trustees and Illinois Central Railroad Company, under which the Trustees paid the Illinois Central Railroad Company $1.87½ for each passenger car switched into Grand Central Station, which included all of the cars in the Trustees' interstate commerce train being switched into the station at the time Haney was killed (R. 193). The undisputed evidence at the trial further proved that the Trustees of the Frisco Railroad paid the Illinois Central Railroad 2 12 of Haney's, the deceased's, wages to reimburse it for that amount (R. 19). In addition to this, the Trustees paid the Illinois Central Railroad Company 2 12 of the other two switch tenders' wages, who worked at the same switches which Haney maintained at the time he was killed, and also paid 2 12 of the cost of electricity furnished for operation of color signals used at the switches where Haney worked (R. 125-128).

At and prior to the time that the deceased was killed, he was on duty as a switch-tender in the railroad yards near Grand Central Station at Memphis, Tennessee. On December 21, 1939, at about 7:30 P. M., Haney, the deceased, in the performance of his duties threw or opened a switch to permit the interstate passenger train of respondent Trustees from Birmingham, Alabama, to back over said switch and into Grand Central Station. Haney's duties required him to wait at the switch until the passenger train had cleared and then to close it and return to his shanty or headquarters near by (R. 219, 305). When Haney closed the switch it would change a signal light over the switch from red to blue and permit other trains and engines to use the crossing. After the passenger train cleared the switch, the light remained red and the switch opened. On investigation, Haney was found lying face down about five

feet north of the north rail of the track over which the train had just passed (R. 216) with his head pointing in the general direction in which the train had just backed in. Haney did not close the switch as it was his duty to do. Haney's only injury was a bruise in the back of the head which caused a fractured skull from which he died, and bruises on his face where it struck the ground (R. 281). Dr. Turner, who examined and assisted in performing an autopsy on Haney's body, testified that the wound on the back of Haney's head was such as would be caused by a round, fast-moving object, which could have been a rod attached to the side of a train backing 8 or 10 miles an hour (R. 285-286). Engineer Mee testified that the 12-car passenger train backed into the station at the rate of 8 or 10 miles an hour (R. 285-287). Witness Gates, another switch-tender working at the next crossing west of Haney, testified that he picked up Haney's white cap after the body was found and that it had a dark mark about an inch and a half long and an inch wide, which ran at an angle across the outside of the back of the cap, which mark corresponded to the wound on Haney's head (R. 204-205). It was further shown that a Frisco mail car was in the train coupled near the engine (R. 149); that this mail car had a mail hook on both sides of the car, fastened at the top (R. 73), hanging down loose on the outside, with a knob on the bottom, and when at rest was 80 inches above the bottom of the rail (R. 97), which was 7 inches high (R. 97). The knob on the lower end of the mail hook when hanging straight down was, therefore, 73 inches above the top of the rail. The evidence showed that when this mail car swayed or moved around a curve, the mail hooks would pivot and swing out from the side of the car from 12 inches to 3 feet (R. 97, 98, 269). The train was moving around a bad curve at the time Haney was killed (R. 150). There were mounds or piles of cinders near the track where Haney's body was found which were from 18 inches

to 2 feet above the top of the rail (R. 267, 298, 360). Haney, the deceased, was shown to be 5 feet 7½ inches tall. He stood 67½ inches from the ground. The mail hook could have, therefore, struck Haney in the back of the head.

One witness testified Haney's body was 5 or 5½ feet north of the track (R. 216). Alvin Haney, the deceased's son, testified he found a spot of blood 6 or 8 inches across, 3 or 4 feet north of the north rail of the track, upon which the train had backed in (R. 93). It was shown that passenger trains such as the one in question have an overhang to the side of the train of 2½ feet (R. 206). Drashman, an employee of the Trustees respondents, testified that he came to the switch a few minutes after Haney's body was found and while it was still lying face down and before it had been turned over, and that a man whom he took to be an Illinois Central switchman, standing at the scene of the accident at the time, stated, "Something sticking out from that train hit Haney" (R. 242, 243, 255, 271). This witness, who was an employe of the defendant trustees, showed by his attitude that he was hostile and made several different statements as to what the switchman had said at the scene of the accident and as to what he saw and heard.

Haney's clothes were not disarranged; there was no evidence of a struggle or fight and no rods, pipes or weapons of any kind were found near the scene of the accident (R. 211), except Haney's own pistol, which had slipped out of his pocket and was found lying under his body when it was turned over (R. 32, 114, 212). It is therefore clear that the mail hook struck Haney in the back of the head. The jury so found (R. 164-165).

Arnold, a switchtender and employee of the Illinois Central Railroad, testified that he was on duty at the next crossing north of Haney at the time he was killed. He

testified that it was Haney's duty after he had opened the switch to, "Just stand there and wait till the train got back" and "close it as soon as it cleared" (R. 219). Witness Bruso, an employee and witness of the Illinois Central Railroad, testified as to Haney (R. 305):

> "Q. His duty was to open the switch and remain there until the train backed in, and then to go to his shanty? A. Yes, sir.
>
> Q. That is the custom, isn't it? A. Yes, sir."

Witness Bundy, another employee of one of the respondents, testified that when they first found Haney's body after the accident, it was lying just north of the track with the head pointing southwest (R. 213).

> "Q. His head was pointing, as you say, southwest? A. Yes, sir.
>
> Q. And this train, Frisco train, had just backed east and north? A. Yes, sir.
>
> Q. Into the station? A. Yes, sir."

Witness Drashman, a hostile witness, employee of one of the respondents, testified that Haney's body was lying parallel to the track over which the train had just backed (R. 264). Drashman made several statements contradictory to his deposition on file and the trial court permitted counsel for petitioner to cross-examine or lead him as a hostile witness (R. 44). In the cross-examination as to the statement made by a switchman immediately after Haney's body was found at the Frisco switch, witness Drashman testified (R. 242):

> "Q. The next question: 'Q. That is, someone told you at the scene of the accident? A. No, he didn't see the accident, I heard someone say that is what happened.' Did you so testify? A. Yes.
>
> Q. And that is true, isn't it? A. Yes, sir.

By the Court: Now, do you want to explain your answer?

By the Witness: Yes, sir. • • •

By Mr. Edwards: Explain any answer you want to."

But respondent's counsel refused to permit the witness to explain (R. 243).

Again witness Drashman testified (R. 255):

"Redirect Examination, by Mr. Edwards.

Q. Mr. Dashman, you said on direct examination that this statement about this thing sticking out from the train hitting Haney was made by an Illinois Central switchman, don't you remember telling me that? A. I suppose it was a switchman, I don't know who it was. • • •

• • • • • • •

Q. You said a moment ago that the man who made the statement that something sticking out from the train hit Haney was an Illinois Central switchman down there at the switch that Haney had thrown, you remember that? A. Yes, sir.

Q. That is true, isn't it? A. I think so; no one else was around there but I. C. men at that time."

The evidence as to the Illinois Central Railroad Company's negligent failure to furnish Haney, its employee, with a reasonably safe place to work and that they furnished him with a dangerous place to work is that the evidence showed that at the switch and the place where Haney was required to work, the ground was high and uneven with piles of cinders both east and west of the switch (R. 267, 298 and 305). In some instances these cinder piles and mounds were from 18 inches to 2 feet above the rails. There was no artificial light near the switch at all. It was about 7:30 P. M. at nighttime. It was dark at the place.

Witness Creagh, one of respondents' employees and witnesses, testified it was so dark at the switch that he could not tell how a man was dressed 10 feet away (R. 144). Witness Mee, respondents' employe and witness and engineer in charge of the passenger train, testified it was so dark he could not see a 2½-inch pipe 50 feet away (R. 311). Alvin Haney testified it was so dark that he could not see a 3-inch pipe 25 feet away (R. 317), and that the ground was rough and uneven and from 18 inches to 2 feet above the rail where he found a spot of blood 3 or 4 feet north of the track (R. 93). The evidence was undisputed as to the lack of light. Respondents claim there was no need of any artificial light, but they erected an electric light over the switch after Haney was killed (R. 27, 309). Under the evidence, it was clear that Haney could not see or be seen at the switch for any distance. Under plaintiff's instruction No. 4, which submitted the case as against respondent Illinois Central Railroad Company, the jury were required to find that the ground was high and uneven, the light was inadequate and insufficient, and the place was unsafe and dangerous, and that Haney was injured by reason of the place being unsafe and dangerous before they would find for plaintiff under this instruction. The instruction did not require the jury to find that a mail hook struck Haney. No objection has been made to the instruction on appeal.

The Proceedings in the State Court.

Trial was had before the Court and a jury and resulted in a verdict and judgment in favor of the petitioner in the sum of $30,000.00 (Thirty Thousand Dollars) against both respondents (R. b).

The Instructions.

Petitioner, the plaintiff in the trial court, submitted his case to the jury as to each of the defendants under separate

instructions. Plaintiff's instruction No. 2 submitted the question of the Liability of defendant trustees of the St. Louis-San Francisco Railway Company for the death of Haney (R. 164-165). It required the jury to find, among other things, that a rod or other object was extending out to the side of the train as it passed Haney and that the defendant was guilty of negligence in permitting the object to swing out and that Haney was killed as a direct result of such negligence, if any. The liability of the Illinois Central Railroad Company was submitted to the jury under plaintiff's instruction No. 4 (R. 166-168). This instruction required the jury to find that the ground where Haney was required to work, was high and uneven and that the light was insufficient and inadequate and that the place was unsafe and dangerous and that the defendant Illinois Central Railroad Company had failed to exercise ordinary care to make said place reasonably safe and that such failure, if any, constituted negligence and that if they found that Haney was injured and killed as a direct result of said place being unsafe and dangerous, then they should find for plaintiff and against the Illinois Central Railroad Company. This instruction did not require the jury to find that Haney was killed by something sticking out from the side of the passing train. No complaint was made against the correctness of this instruction on appeal in the Missouri Supreme Court.

The Verdict and Judgment.

The case was submitted to the jury as to each of the defendants on the above-mentioned instructions and on a measure of damage instruction. The jury returned a verdict against both defendants in favor of petitioner for $30,000.00. A judgment was entered in the trial court against defendants in favor of petitioner for the sum of $30,000.00 and costs. Both defendants filed motions for a

new trial and the trial court overruled said motions. Thereafter, the defendants were allowed separate appeals to the Supreme Court of Missouri. Respondents herein, as appellants in the State Court, duly perfected their separate appeals from said judgment in favor of petitioner in said cause, and said cause was briefed, argued and submitted in Division No. 1 of said Supreme Court on May 1, 1945 (R. 320). Thereafter, on June 4, 1945, said Division No. 1 of said Supreme Court of Missouri, in an opinion filed in said cause on said day (R. 320), ruled that there was no substantial evidence to support the submission of the case to a jury under the hypothesis that a mail hook struck Haney, the deceased. The opinion further held that a mail hook could have struck Haney but that it did not. The opinion also held that the testimony of witness Drashman as to the statement made to him by an Illinois Central switchman a few minutes after Haney's body was found at the scene of the accident, that Haney had been struck by something protruding from the side of the train, was not competent under the res gestae rule, and that there was not sufficient evidence to submit the question of whether something sticking out from the Frisco interstate passenger train struck Haney, and that there was not sufficient evidence that the insufficient light and high and uneven ground and unsafe and dangerous place to work in whole or in part caused or contributed to cause the injury and death of Haney. The Missouri Supreme Court in its opinion held that "it would be mere speculation and conjecture to say that Haney was struck by a mail hook," and further held that all reasonable men in the honest exercise of a fair and impartial judgment would draw the same conclusions from the facts in this case, and it also held that they would not affirm the verdict and judgment for petitioner, because they said that it was based on "conjecture and speculation." The Supreme Court of

Missouri, by its opinion and judgment rendered and entered June 4, 1945, reversed the $30,000.00 judgment in favor of petitioner.

Opinion of the Supreme Court of Missouri.

Thereafter, on the 18th day of June, 1945, and within the time allowed therefor by the rules of said Supreme Court of Missouri, petitioner duly filed in said cause, in said Division No. 1 of the Supreme Court of Missouri, his motion for a rehearing and to transfer said cause to the court in banc and suggestions in support of said motion, the Highest Court of the State of Missouri under Section 4 of the Amendment of 1890 to Article VI of the Constitution of the State of Missouri, providing that "when a Federal question is involved, the cause, on the application of the losing party, shall be transferred to the Court (in banc) for its decision; or when a division in which a cause if pending shall so order, the cause shall be transferred to the Court (in banc) for its decision."

Thereafter, on the 2nd day of July, 1945, petitioner's said motion for a rehearing and to transfer said cause from said Division No. 1 of the Supreme Court of Missouri to the Court (The Supreme Court of Missouri) in banc, was by Division No. 1 of the said Supreme Court overruled, whereby and on which day said judgment of said Division No. 1 of the Supreme Court of Missouri in said cause, reversing said judgment in favor of petitioner, became final.

Petitioner, prior to July 17, 1945, delivered to the Clerk of the Supreme Court of Missouri his motion to modify the opinion of the Supreme Court of Missouri, in which said motion petitioner asked that said Supreme Court modify its opinion by stating the issues and the facts in accordance with the record, as will more particularly appear in

said motion to modify. The Clerk of the Supreme Court of Missouri refused to file petitioner's said motion to modify. Petitioner thereupon, on July 17, 1945, filed in said cause in the Supreme Court of Missouri, his motion for leave to file said motion to modify the opinion, for the reason that no rule of the Supreme Court of Missouri specifies or provides when a motion to modify an opinion should be filed. Thereafter, on September 4, 1945, the Supreme Court of Missouri entered its order in said cause overruling petitioner's motion for leave to file his motion to modify the opinion and gave as a reason for said ruling that said motion to modify was not filed within the time allowed for filing a motion for rehearing. The Supreme Court of Missouri did on September 11, 1945, on motion of petitioner, order its mandate stayed in said cause.

The Missouri Supreme Court's opinion found that a mail hook could have struck Haney, but that it didn't. Lavender v. Kurn, 189 S. W. (2d) 253, l. c. 255 (R. 331). The Opinion states:

> "It could be inferred from the facts that Haney could have been struck by the mail hook knob if he were standing on the south side of the mound and the mail hook extended out as far as 12 or 14 inches."

The opinion also erroneously finds that Haney's body was lying with the head toward the track and the feet extending north at right angles to the track as a reason why the mail hook didn't strike Haney. In this conclusion, the opinion overlooks the testimony of witness Bundy, another employee of one of the respondents, to the effect that Haney's head was pointing southeast (R. 213).

The Supreme Court's opinion near the end, in four lines, takes away petitioner's right to trial by jury and decides

the question of fact against the petitioner in these words (R. 331). Lavender v. Kurn, 189 S. W. 253, l. c. 259:

> "And we also rule that there was no substantial evidence that the uneven ground and insufficient light were causes or contributing causes of the death of Haney."

The State Supreme Court's opinion decided a question of fact contrary to the jury's finding.

SPECIFICATION OF ERRORS.

The Supreme Court of Missouri erred in its opinion in this cause in ordering the judgment herein in favor of petitioner reversed under an erroneous finding of the law and facts, under the Employers' Federal Liability Act as applied to the evidence in this case, in the following particulars:

(1) In holding and deciding that the evidence adduced at the trial of said cause below did not suffice to make the case one for the jury, and that, therefore, petitioner, as a matter of law, was not entitled to recover under the Employers' Liability Act as against respondents, J. M. Kurn et al., Trustees of the St. Louis-San Francisco Railway Company, Debtor.

(2) In holding and deciding that the evidence adduced at the trial of said cause below, did not suffice to make the case one for the jury, and that, therefore, petitioner, as a matter of law, was not entitled to recover under the Employers' Liability Act as against respondent, the Illinois Central Railroad Company, a corporation.

(3) In holding and deciding that no substantial evidence was adduced at the trial of said cause to warrant the submission of the case to the jury on the hypothesis that respondents, J. M. Kurn et al., Trustees of the St. Louis-San Francisco Railway Company, Debtor, negligently caused, suffered, and permitted a rod, stick or other object to project out or swing out from the side of its interstate passenger train and to strike and injure and kill Haney, the deceased.

(4) In holding and deciding that no substantial evidence was adduced at the trial of said cause to warrant

the submission of the case to the jury on the hypothesis that respondent Illinois Central Railroad Company negligently failed to furnish its employee, Haney, the deceased, with a safe place to work, which negligence in whole or in part resulted in Haney's death.

(5) In holding and deciding that to submit the case to the jury, upon the theory that Haney's death was caused by something protruding out on the side of the interstate train as it backed in to Grand Central Station which resulted in Haney's death, would invite a verdict based on speculation or conjecture.

(6) In holding and deciding that to submit the case to the jury, on the theory that respondent Illinois Central Railroad Company negligently failed to furnish Haney, its employee, with a safe place to work and negligently furnished him with a dangerous place to work which resulted in Haney's death, would invite a verdict based on speculation or conjecture.

(7) In failing and refusing to consider, on the question of whether the case was for the jury as to each of the two Railroads, material testimony and evidence favorable to petitioner, having an important bearing on that issue.

(8) In inadvertently and erroneously drawing the wrong conclusions and making the wrong description of the evidence as to each of the Railroad respondents on the question of whether the case was one for the jury and in failing to consider testimony in evidence favorable to petitioner having an important bearing on the issues tried and decided by the trial court.

(9) In failing to properly consider and sustain petitioner's motion for a rehearing.

(10) In failing and refusing to amend the opinion in accordance with petitioner's motion to modify same.

(11) In holding that witness Drashman's statement that an I. C. switchman at the time Haney's body was found, stated something sticking out from the train hit him was incompetent evidence.

(12) In holding that under the evidence, a mail hook could have hit Haney but did not.

(13) In holding that no case was made for the jury against the Illinois Central Railroad Company for failing to furnish Haney with a safe place to work without stating the issues and facts and in holding and finding that the uneven ground and insufficient light were not contributing causes of Haney's death.

SUMMARY OF THE ARGUMENT.

(1)

The evidence adduced at the trial of this cause in the State Court on the issue of respondent's Trustees liability for the injury and death of said L. E. Haney under the Employers' Liability Act as for negligence on the part of said respondent, J. M. Kurn et al., Trustees, etc., in negligently permitting something to protrude or swing out to the side of their interstate passenger train as it passed Haney, the deceased, amply sufficed to make that issue one for the jury; and Division No. 1 of the Supreme Court of Missouri erred in holding that petitioner was not entitled to have such issue submitted to the jury.

(2)

The evidence adduced at the trial of this cause in the State Court on the issue of respondent, Illinois Central Railroad Company's, liability for the injury and death of said Haney, under the Employers' Liability Act as for negligence on the part of said respondent, in negligently failing to furnish its employee Haney a safe place to work, and in furnishing him a dangerous place to work, amply sufficed to make that issue one for the jury; and Division No. 1 of the Supreme Court of Missouri erred in holding that petitioner was not entitled to have such issue submitted to the jury.

(3)

The ruling of Division No. 1 of the Supreme Court of Missouri that the evidence adduced in said cause constituted no substantial evidence to warrant the submission of the case to the jury on the hypothesis that respondent trustees negligently caused, suffered and permitted a rod, or other object, to protrude or swing out to the side of its

interstate train and that respondent Illinois Central Railroad Company failed to furnish Haney, its employee, with a safe place to work and furnished him with a dangerous place to work that resulted in Haney's death, and that to submit the case on these theories would invite a verdict based on conjecture or speculation, is not in accord with the applicable decisions of this Court holding that on the question whether a case is made for the jury, the evidence is to be viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference favorable to him that may be fairly and reasonably drawn therefrom; that conflicts in the evidence, the credibility of witnesses, and the weight to be given to their testimony, are for the jury; and that, if on the issue of liability, reasonable and fair-minded men may honestly draw different inferences or conclusions from the evidence, the question is one for the jury.

Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29;
Seago v. N. Y. Cent. R. Co., 315 U. S. 781, 62 Sup. Ct. Rep. 806;
Gunning v. Cooley, 281 U. S. 90, 74 L. Ed. 720;
Myers v. Pittsburgh Coal Co., 233 U. S. 184, l. c. 192, 193, 58 L. Ed. 906;
New York Central R. Co. v. Marcone, 281 U. S. 345, 74 L. Ed. 892;
Jenkins v. Kurn, 313 U. S. 256, 61 Sup. Ct. 934;
Lumbra v. United States, 290 U. S. 551, 553, 78 L. Ed. 492;
Baltimore & Ohio R. R. Co. v. Groeger, 266 U. S. 521, 524, 527, 69 L. Ed. 419;
Best v. District of Columbia, 291 U. S. 411, 78 L. Ed. 888;
Choctaw O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. Ed. 96;
Western & Atlantic R. Co. v. Hughes, 278 U. S. 496, 73 L. Ed. 473;
Hayes v. Michigan Central R. Co., 111 U. S. 228, 28 L. Ed. 410;

Barney v. Schmeider, 9 Wall. 248, 19 L. Ed. 648;
Pawling v. United States, 4 Cranch. 219, 2 L. Ed. 601.

(a) The State Court erred in holding that it could be inferred from the facts that Haney could have been struck by the mail hook knob but that this didn't happen.

Authorities cited, Supra.

(b) The State Court erred in holding that there was no substantial evidence that the uneven ground and insufficient light were contributory causes of Haney's death. This was a jury question. The jury found that by reason of this fact the place where Haney worked was unsafe and dangerous and that this was the proximate cause of his death. The State Court found that it was not the cause of his death. This was error.

Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29

(4)

The State Court erred in failing to take into consideration testimony highly favorable to petitioner given by witnesses Drashman, Alvin Haney, Arnold, Bruso, Turner and Gates. Under both the Federal rule and the State rule whether the case was one for the jury was a matter to be determined on appeal by a consideration of all the evidence material to that issue.

Western Atlantic R. Co. v. Hughes, 278 U. S. 496, 73 L. Ed. 473;
Stauffer v. Metropolitan Street Ry. Co., 243 Mo. 305, 316;
Lorton v. Mo. Pac. R. Co., 306 Mo. 125, 137;
Rosenssweig v. Wells, 308 Mo. 617, 273 S. W. 1071;
Johnson v. Southern Ry. Co., 351 Mo. 1110, 175 S. W. 2nd 802.

(5)

This court, on certiorari, is not confined to a consideration of the evidence stated by the State Court in its opinion, but will review the entire record and determine for itself the sufficiency of the evidence and whether petitioner was denied a Federal right by the opinion and judgment below.

Great Northern Ry. Co. v. State of Washington, 300 U. S. 154, 81 L. Ed. 573;

United Gas Public Service Co. v. State of Tex., 303 U. S. 123, 143, 82 L. Ed. 702;

Chicago Great Western R. Co. v. Rambo, 298 U. S. 99.

ARGUMENT.

This is an action under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 52, Act of April 22, 1908, c. 149, Section 1, 35 Stat. 65), brought by Walter A. Lavender, Admr., d. b. n. of the Estate of L. E. Haney, deceased, for the benefit of the widow and children of the deceased, to recover damages for the alleged wrongful death of said deceased, charged to have been proximately caused by the negligence of the respondent, J. M. Kurn et al., trustees of the St. Louis-San Francisco Railway Company, Debtor, in negligently causing, suffering, and permitting a rod or other object to project out from the side of its interstate passenger train and the negligence of respondent, Illinois Central Railroad Company, in failing to furnish Haney, the deceased, its employee, with a safe place to work.

The pertinent provisions of the Employers' Liability Act are:

> "Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representatives * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier."

The undisputed evidence in the record is that L. E. Haney was a switchtender working at his duties assigned to him at the time he was injured and killed on December 21, 1939, in the railroad yards near the Grand Central Station at Memphis, Tenn. The evidence also shows that it was Haney's duty to open and close the switch for the respondent trustees' interstate passenger train on its regular run from Birmingham, Alabama, to Memphis, Tenn.

The evidence shows that Haney's work at the time he was killed was solely for the use and benefit of the two respondent railroads herein. The Illinois Central Railroad Company was in possession of and owned Grand Central Station at Memphis, Tennessee and had a written contract with the trustee respondents of the Frisco Railroad Company for that company to use Grand Central Station jointly with the Illinois Central Railroad. In this written contract, the trustees of the Frisco Railroad Company paid the Illinois Central Railroad Company 1.87½ for each passenger car switched into Grand Central Station which included all of the cars in the interstate passenger train being switched and backed into Grand Central Station at the time Haney was killed (R. 19). Under the written contract between respondents the trustees of the Frisco Railroad Company agreed to and did pay the Illinois Central Railroad Company 2 12 of Haney, the deceased's, wages to reimburse them for that amount (R. 19). The trustees also under their written contract for the use of Grand Central Station paid the Illinois Central Railroad 2 12 of the wages of other switchtenders who worked at the same switches where Haney worked and also paid the trustees 2 12 of the cost of the operation of the switch lights at the place where Haney worked (R. 125-128).

The Interstate Commerce Act itself provides that where any part of an employee's duty directly affects interstate commerce he shall be deemed for the purpose of the Federal Employers' Liability Act, an employee of the carrier for whom the employee is furthering the interstate movement.

Chapter 2, Title 45, U. S. Code, Section 51, in its title provides for the liability of carriers for injuries to employees and defines "employees." This section of the Act reads, in part, as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * *."

The definition of employee continues in the words of the Act in the second paragraph as follows:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purpose of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter (Apr. 22, 1908, ch. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, ch. 685, Sec. 1, 53 Stat. 1404)."

We therefore believe that it is clear beyond doubt that Haney was employed in interstate commerce at the time of his death by the respondents' railroads.

(1)

Petitioner submits that the evidence adduced at the trial of the cause in the Circuit Court of the City of St. Louis, Missouri, on the issue of respondent's liability under the Employers' Liability Act for the death of their employee, Haney, a switch tender, as for negligence on the part of both respondents as shown by the record of the cause in Division #1 of the Supreme Court of Missouri filed herewith, amply sufficed to make those issues one for the jury, and that Division #1 of the Supreme Court of Missouri erred in holding that petitioner was not entitled to have such issues submitted.

The Missouri Supreme Court's opinion found that a mail hook could have struck Haney, but that this didn't happen. They said (R. 331):

"It could be inferred from the facts that Haney could have been struck by the mail hook knob if he were standing on the south side of the mound and the mail hook extended out as far as 12 or 14 inches."

The State Court's opinion overlooked the fact that witnesses Arnold and Bruso both testified that after Haney opened the switch it was his duty to remain there and close it, after the train had backed in (R. 219, 305). It also overlooked in the opinion that Haney's body was found there at the switch on the mound, described in the opinion lying face down with the character of an injury in the back of his head which would have been made, should the knob of mail hook struck him there while the train was moving, 8 or 10 miles an hour, according to Dr. Turner, who performed the autopsy on the body (R. 285-286).

The Missouri Supreme Court's opinion seeks to justify its conclusion that there wasn't sufficient evidence to submit the case to the jury as to the trustees on the theory that something protruding from the side of the train struck and killed Haney, by several different alleged reasons.

First, the opinion states that Haney was seen to go to the south side of the track after he opened the switch for the train to back in and that the trustees' conductor Creagh testified that he saw Haney go to the south side of the track. This was contradicted by the deceased's widow. Witness Creagh testified that it was so dark at the switch that he could not see how Haney was dressed 10 feet away (R. 144).

Mrs. Haney, widow of the deceased, testified that she had heard that Creagh, the conductor, was claiming that her husband, the deceased, went to the south side of the track after he had opened the switch and that she called upon witness Creagh after her husband was killed and asked him if he knew anything about how her husband

was killed; that Creagh told her his memory wasn't good and that he didn't remember anything about her husband going to the south side of the track; that he didn't know where he was standing or anything about it (R. 159). The opinion states that according to Rule 104, Haney was supposed to go to the south side of the track after he had opened the switch.

The opinion also erroneously finds that Haney's body was lying with the head toward the track and the feet extending north at right angles to the track as a reason why the mail hook didn't strike Haney. In this conclusion, the opinion overlooks the testimony of witness Bundy, another employee of one of the respondents, to the effect that Haney's head was pointing southeast (R. 213):

> "Q. His head was pointing, as you say, southeast? A. Yes, sir.
>
> Q. And this train, Frisco train, had just backed east and turned north? A. Yes, sir.
>
> Q. Into the station? A. Yes, sir."

Witness Drashman, the hostile witness employee of one of the respondents, testified that Haney's body was lying parallel to the track over which the train had just backed (R. 264).

The opinion assumes that witness Drashman only testified that the I. C. switchman stated that Haney was supposed to have been struck by something sticking out from the train. It overlooks other statements made by witness Drashman more favorable to petitioner in which he testified at the trial (R. 242):

> "Q. The next question: 'Q. That is, someone told you at the scene of the accident? A. No, he didn't see the accident, I heard someone say that is what happened.' Did you so testify? A. Yes.
>
> Q. And that is true, isn't it? A. Yes, sir.

By the Court: Now, do you want to explain your answer?

By the Witness: Yes, sir. * * *

By Mr. Edwards: Explain any answer you want to."

But respondent's counsel refused to permit the witness to explain (R. 243).

Again Witness Drashman testified on re-examination (R. 255):

"Redirect Examination, by Mr. Edwards.

"Q. Mr. Drashman, you said on direct examination that this statement about this thing sticking out from the train hitting Haney was made by an Illinois Central switchman, don't you remember telling me that? A. I suppose it was a switchman, I don't know who it was. * * *

Q. You said a moment ago that the man who made the statement that something sticking out from the train hit Haney was an Illinois Central switchman down there at the switch that Haney had thrown, you remember that? A. Yes, sir.

Q. That is true, isn't it? A. I think so; no one else was around there but I. C. men at that time."

(2)

The evidence was uncontradicted that it was exceedingly dark at the switch where Haney was working. One witness said you couldn't see how a man was dressed ten feet away at the switch (R. 144). Under the evidence, it was clear that Haney could not see or be seen at the switch where he worked and where his body was found. Under plaintiff's instruction 4, which submitted the case as against respondent Illinois Central Railroad Company, the jury were required to find that the ground was high and uneven, the light was inadequate and insufficient, and the place was unsafe and dangerous, and that Haney was injured by reason of the place being unsafe and dan-

gerous before they could find for plaintiff. The instruction did not require the jury to find that a mail hook struck Haney. No objection has been made to the instruction on appeal. The Supreme Court's opinion near the end, in four lines, takes away petitioner's right to trial by jury and decides the question of fact against the petitioner in these words (R. 331) (Layender v. Kurn, 189 S. W. 253, l. c. 259):

> "And we also rule that there was no substantial evidence that the uneven ground and insufficient light were causes or contributing causes of the death of Haney."

By this cryptic clause the State Supreme Court's opinion decided a question of fact contrary to the jury's finding.

The jury had found under plaintiff's instruction No. 4 (R. 166-168) not only that the place was unsafe and dangerous, but they found that the unsafe and dangerous place was the proximate cause of the injury and death of Haney. The Supreme Court of Missouri usurped the power of the jury in deciding the question of the proximate cause of Haney's death and reversed the jury's verdict and finding on that question. The State Supreme Court therefore deprived your petitioner and the dependents of Haney of their constitutional right of trial by jury.

(3)

The ruling of the Supreme Court of Missouri, Division No. 1, that in this case no substantial evidence was adduced to warrant the submission of the case to the jury on the hypothesis that something protruding from the side of the passenger train struck Haney and that respondent Illinois Central Railroad Company negligently failed to furnish him with a safe place to work, which resulted in his death, but that to submit the case on those theories

would invite a verdict based on conjecture and speculation is plainly not in accord with the applicable decisions of this court.

It is the well-settled rule of this Court that, on the question whether a case is made entitling the plaintiff to the judgment of a jury, the evidence is to be viewed in the light most favorable to the plaintiff, and the plaintiff is to be accorded the benefit of every inference favorable to him that may fairly and reasonably be deduced therefrom; that it is the province of the jury to resolve any conflicts in the evidence and to pass upon the credibility of the witnesses and the weight to be given to their testimony; and that if, on the issue of liability, reasonable and fair-minded men may honestly draw different inferences or conclusions from the evidence, the question is not one of law for the Court but one of fact for the jury.

Gunning v. Cooley, 281 U. S. 90, 74 L. Ed. 720;
Meyers v. Pittsburgh Coal Co., 233 U. S. 184, l. c. 192, 193, 58 L. Ed. 906;
New York Central R. Co. v. Marcone, 281 U. S. 345, 74 L. Ed. 892;
Jenkins v. Kurn, 313 U. S. 256, 61 Sup. Ct. 934;
Baltimore & Ohio R. R. Co. v. Groeger, 266 U. S. 521, 524, 527, 69 L. Ed. 419;
Western & Atlantic R. Co. v. Hughes, 278 U. S. 496, 73 L. Ed. 473;
Hayes v. Michigan Central R. Co., 111 U. S. 228, 28 L. Ed. 410, l. c. 415.

The principles here applicable have been stated and applied by this Court in a long line of decisions from the time of Chief Justice Marshall (Pawling v. United States, 4 Cranch. 219, 2 L. Ed. 601). But in the instant case the state court failed to apply such principles to the facts of this record. We mean no disrespect to the state court when we say that it rendered lip service to the rule that

where uncertainty arises from a conflict in the testimony, or if fair-minded men may honestly draw different conclusions from the evidence, the case is one for the jury (R. 331), but inadvertently failed to realize that a proper application thereof to the evidence in this record would compel a holding that the case was one for the jury.

The Missouri Supreme Court first found that it could be inferred that the mail hook struck Haney as alleged in plaintiff's petition and found by the jury. It then searches the record for bits of evidence, which are contradicted by plaintiff's evidence, and finds this contradictory evidence to be true as a matter of fact. For example, the opinion indicates that it finds that Haney after throwing the switch went to the south side of the track. The opinion states that Creagh, respondent's witness, so testified and that Rule #104 provides that Haney should go to the south side of the track. The opinion fails to state or consider the testimony of Mrs. Haney to the effect that Creagh told her that he didn't know anything about where Haney went; that he didn't know where he was standing, and that his memory was bad. The witness testified that he could not see how Haney was dressed ten feet away.

The opinion also fails to state that the evidence showed that it was Haney's duty to be at the switch where his body was found.

The application of Rule #104 that Haney should have gone to the south side of the track is disputed by witnesses Arnold and Bruso, employees of the respondents, who stated that it was Haney's duty after opening the switch to remain at the switch and close it as soon as the train had cleared. The State Court refused to correct its opinion on petitioner's motion to modify. The opinion also asserts that Haney's body was lying at right angles to the track. It ignores other testimony that the body was lying with the head pointing in the direction which the train had backed. The opinion also rules out the important tes-

timony of one of respondent's employees, Drashman, in which he stated that one of respondent's, Illinois Central's, switchmen at the scene of the accident, a few minutes after the body had been found, stated that something sticking out from that train hit Haney. The opinion fails to state the issue or to properly decide the case on petitioner's right to recover against the Illinois Central Railroad Company for failing to furnish Haney a safe place to work. It simply states and rules that there was no substantial evidence that the uneven ground and insufficient light were causes or contributing causes of the death of Haney. By this ruling the State Supreme Court decided a question of proximate cause against petitioner, when under the law this is a question of fact for the jury and should be left to the jury's finding.

In a suit under the Federal Employers' Liability Act to recover for the death of an employee there was evidence from which the jury could reasonably infer that failure to ring the bell before starting the locomotive was negligence of the defendant, and that that negligence was the proximate cause of the death; and a judgment for the defendant notwithstanding a verdict for the plaintiff deprived the latter of the right to trial by jury. P. 32.

An appellate court is not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions, or because the court regards another result as more reasonable. P. 35.

Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, this Court said, l. c. 35:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review

is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the Court, which is the fact-finding body. * * *

"Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

In the case of Seago v. New York Central Railroad Company, 315 U. S. 781, 62 Sup. Ct. Rep. 806, this court by memorandum opinion reversed the Missouri Supreme Court in an opinion written at 155 S. W. 2nd 126. In a Federal Employers' Liability case, the Missouri Supreme Court, as it has in the case at bar, held that there was not sufficient evidence to take the case to the jury on the theory that no hand-lantern back up signal had been given before the train was started, and gave a similar reason as in the case at bar, in that to have held that the case was properly submitted to the jury would permit a verdict to have stood on conjecture and speculation.

In New York Central R. Co. v. Marcone, 281 U. S. 345, 74 L. Ed. 892, the deceased employee, employed in the defendant's roundhouse, was run over and killed by an engine while it was being backed out of the roundhouse. There was no eyewitness to the accident. Despite uncontradicted testimony that the whistle was sounded a few minutes before the engine began to move, as a warning that it was to be backed out of the roundhouse, this Court held that from the evidence as a whole and the inferences that might be drawn therefrom reasonable men could with propriety conclude that the defendant was negligent in failing to take reasonable precautions to avert such a casualty.

In the recent case of Jenkins v. Kurn, 313 U. S. 256, 61 Sup. Ct. Rep. 934, the plaintiff was a fireman on a moving train. As the train emerged from a curve he observed a

train standing not more than six hundred feet ahead on the same track and shouted to the engineer to push the brake valve over in emergency. The engineer turned and looked at the plaintiff but did nothing to arrest the movement of the train until the engine was but two or three car lengths from the standing train, at which moment plaintiff leaped from the engine and was injured. The engineer was killed. Division No. 1 of the Supreme Court of Missouri held that no case was made for the jury and reversed the judgment below on the ground that there was "Not even a scintilla of evidence that the engineer understood what plaintiff said" (Jenkins v. Kurn, 144 S. W. [2] 76, l. c. 79).

It happens that the opinions in both the Jenkins and Seago cases were written by the same Commissioner who wrote the opinion in the instant case. This Court reversed the opinion and judgments in both the Jenkins and the Seago cases on the ground that the Missouri Supreme Court erred in holding that the cases should not have been submitted to the Jury.

In the Jenkins case the state court failed to reckon with the inferences that arose from the plaintiff's testimony that he "hollered" his warning loudly, that only a narrow space separated him from the engineer, that the engineer's hearing was "all right," that the plaintiff and the engineer could and did carry on "normal conversations" while the train was operating, and that there was comparatively little noise in the cab from the train. This court granted certiorari, and upon a review of the case held that the evidence was ample to warrant the submission of the issue of the engineer's negligence to the jury and reversed the judgment of Division No. 1 of the Supreme Court of Missouri therein (Jenkins v. Kurn, 313 U. S. 256). By the same token the judgment of the state court in the instant case should be reversed.

(4)

The opinion of the Supreme Court of Missouri, in holding and deciding that there was not sufficient evidence to submit the question of the Illinois Central Railroad Company's liability to petitioner for failing to furnish Haney, its employee, a reasonably safe place to work, is in direct conflict with the decisions and holdings of this Court. In the case of Choctaw, Oklahoma R. R. Company v. McDade, 191 U. S. 64, this Court held that it is the duty of a Railroad Company to use due care to provide a reasonably safe place and safe appliances for the use of workmen in its employ. It is obliged to use the same degree of care to provide properly constructed road bed structures and track to be used in the operation of the railroad. The respondent Illinois Central Railroad Company, therefore, under the holding of this court, was charged with the duty to use due care to provide a reasonably safe place for Haney to work. It did not provide such a place and Haney was killed by reason thereof. The jury so found. The Missouri Supreme Court erred in holding to the contrary and its opinion is in conflict with this Court's decisions on that question.

Where workmen are engaged in a hazardous occupation, such as underground mining, it is the duty of the master to exercise reasonable care for their safety, and not to expose them to injury by use of dangerous appliances or unsafe places to work, when such appliances and places can, by the exercise of due care, be made reasonably safe.

Myers v. Pittsburgh Coal Co., 233 U. S. 184, l. c. 191:

> "The trial court submitted the case to the jury to determine whether the defendant had failed to discharge its duty of using reasonable care to provide a proper and safe place for Myers to work, that is, in failing to provide adequate lights at a dangerous place and permitting the motor car to be operated without the headlight, and also in permitting an ex-

posed live trolley wire to cross the main track at insufficient elevation. An inspection of the record satisfies us that there was testimony enough in the case to carry these questions to the jury under the instructions which were given. The duty of the master to use reasonable diligence to provide a safe place for the employes to work, to carry on the occupation in which they are employed is too well settled to require much consideration now. This duty is a continuing one and discharged only when the master provides and maintains a place of that character. Baltimore & Potomac R. R. Co. v. Mackey, 157 U. S. 72, 87; Union Pacific Ry. Co. v. O'Brien, 161 U. S. 451; Choctaw, Oklahoma & Gulf R. R. Co. v. McDade, 191 U. S. 64; Kreigh v. Westinghouse & Co., 214 U. S. 249, 255. Under the case made, the jury might well have found that the overhead wire was hung too low for the safety of the men; that there was want of adequate light at this place, and that it was negligence to run the motor car into such a place without the light which it was its duty to provide. Where workmen are engaged in such mines in occupations more or less hazardous, it is the duty of the master to exercise reasonable care for their safety and not to expose them to injury by use of dangerous appliances or unsafe places to work, when the exercise of due skill and care will make the appliances and places reasonably safe. Choctaw, Oklahoma & Gulf R. R. Co. v. McDade, supra, 66; Kreigh v. Westinghouse & Co., supra, 256."

Under both the federal rule and the state rule whether there was evidence to warrant the submission of the issue of the engineer's negligence was a matter to be determined on appeal by a consideration of all the evidence material to that issue. Western Atlantic R. Co. v. Hughes, 278 U. S. 496, 73 L. Ed. 473; Stauffer v. Metropolitan Street Ry. Co., 243 Mo. 305, 316; Lorton v. Mo. Pac. R. Co., 306 Mo. 125, 137. The state court failed to observe the rule.

(5)

This court, on certiorari, is not confined to a consideration of the evidence stated by the state court in its opinion, but will review the entire record and determine for itself whether the evidence sufficed to take to the jury the issue of negligence; whether petitioner was denied a federal right by the opinion and judgment of the state court. Great Northern Ry. Co. v. State of Washington, 300 U. S. 154, 81 L. Ed. 573; United Gas Public Service Co. v. State of Texas, 303 U. S. 125, 143, 82 L. Ed. 702; Chicago Great Western R. Co. v. Rambo, 298 U. S. 99.

CONCLUSION.

From the foregoing, we submit that it appears clearly from the facts in this case that the deceased, Haney, was struck and killed by something protruding or swinging out from the side of respondent trustee's interstate train and that the Supreme Court of Missouri committed error in finding that a mail hook could have struck the deceased but didn't, and erred in holding that there was not sufficient evidence to submit the question of respondent trustee's liability to petitioner to the jury and that there was sufficient evidence to submit the question as to whether or not respondent Illinois Central Railroad Company furnished Haney with a safe place to work and that the Supreme Court of Missouri erred in holding that there was not sufficient evidence to submit to the jury the question of the liability of the respondent Illinois Central Railroad Company for failure to furnish the deceased with a safe place to work and that the Supreme Court of Missouri's finding and holding that the uneven ground and insufficient light were not causes contributing to Haney's death was erroneous.

It consequently follows that the Supreme Court of Missouri erred in reversing the judgment secured by this

petitioner against the respondents on the theory that to affirm the judgment would invite a verdict based on speculation or conjecture. We, therefore, respectfully submit that this Honorable Court should reverse the judgment and decision of the Supreme Court of Missouri, and order the judgment in favor of petitioner reinstated.

Respectfully submitted,

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APPENDIX.

We set out below, for the convenience of the Court, in reference, Sections of the Judicial Code and Federal Employers' Liability Act as the same appear in the United States Code.

Title 28, Judicial Code, Section 344:

"344. (Judicial Code, Section 237.) Appellate Jurisdiction of Decrees of State Courts; Certiorari.

"(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal. The appeal shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the appeal.

"(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties,

or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on appeal in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on appeal might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

Sections 51 and 52:

"51. **Liability of common carriers by railroad in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.**

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of

interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. (Apr. 22, 1908, ch. 149 1, 35 Stat. 65; Aug. 11, 1939, ch. 685-1, 53 Stat. 1404.)

"52. **Carriers in Territories or other possessions of the United States.**

"Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment (Apr. 22, 1908, ch. 149 2, 35 Stat. 65)."

LIST OF CASES DISCUSSED IN THIS BRIEF.

Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29;
Seago v. N. Y. Cent. R. Co., 315 U. S. 781, 62 Sup. Ct. Rep. 806;
Gunning v. Cooley, 281 U. S. 90, 74 L. Ed. 720;
Myers v. Pittsburgh Coal Co., 233 U. S. 184, l. c. 192, 193, 58 L. Ed. 906;
New York Central R. Co. v. Marcone, 281 U. S. 345, 74 L. Ed. 892;
Jenkins v. Kurn, 313 U. S. 256, 61 Sup. Ct. 934.